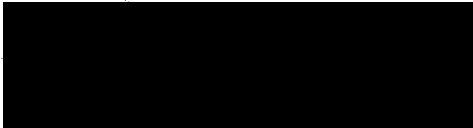


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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

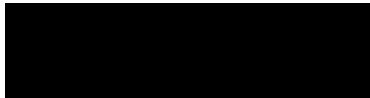


U.S. Citizenship
and Immigration
Services



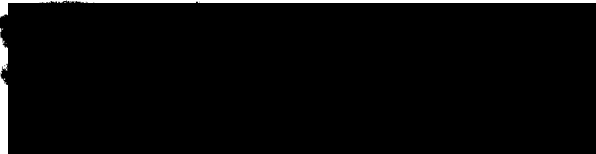
FILE: WAC 03 100 52017 Office: CALIFORNIA SERVICE CENTER Date: 07-12-2006

IN RE: Petitioner:
Beneficiary:



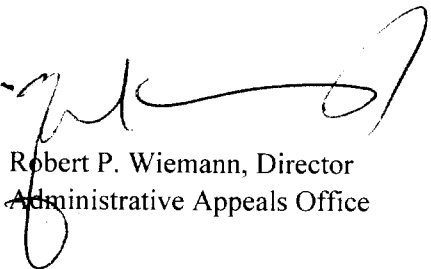
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly and
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a corporation organized in the State of California that is engaging in the business of import, marketing, and sales of incense and perfume products. It claims to be a wholly-owned subsidiary of Ranga Rao & Sons, located in Mysore, India. The petitioner seeks to employ the beneficiary as manager of product development, and filed a petition to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director denied the petition, concluding that the petitioner has failed to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director further determined that the evidence of record has not established that the U.S. entity is more than the foreign entity's representative office in the United States, or that the function of the beneficiary is to be more than an import/export agent or trade representative.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred in finding that the petitioner is an import/export agent or a trade representative not capable of supporting a managerial position, and that the petitioner is nothing more than a representative office of the foreign parent company. Counsel submits additional evidence in support of this assertion.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United

States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the Form I-129, the petitioner described the proposed duties of the beneficiary in the U.S. entity as "product development, marketing and sales of incense & perfume products." In a letter accompanying the initial petition, the petitioner further described the beneficiary's anticipated duties in the U.S. entity as follow:

[The beneficiary] will be responsible for managing day-to-day activities of the new company's business operation as well as product development, marketing and sales. With regard to daily operational management, he will manage accounting, human resources, and supply chains, as well as all other management matters of the company. He will set up new accounts and provide services to existing accounts, as well as be responsible for inventory and order management. With respect to product development, [the beneficiary] will identify and develop incense and perfume product concepts and products for the introduction to the U.S market and monitor market trends for customization and new products. Regarding marketing and sales, [the beneficiary] will identify perfume market in the United States, develop potential perfume products for the U.S. market, in addition to marketing incense products. He will also manage the development of marketing and sales materials for prospective customers and a website for online marketing. [The beneficiary] will utilize his experience in managing [the foreign entity's] product development, international marketing and sales, and customer relationship development to perform these duties.

The petitioner also indicated that the beneficiary would supervise an administrative assistant and two shipping/packing specialists, and would report the company's day-to-day operations, product development and marketing and sales activities directly to the company's president.

In a notice dated February 19, 2003, the director requested further evidence from the petitioner. In connection with the beneficiary's proposed position in the U.S. entity, the director requested an organizational chart, which must identify the beneficiary's position; list all of the employees under the beneficiary's direction by name and job title; and include a description of job duties, educational level, annual salaries/wages, and immigration status for all employees of the U.S. entity. The director also requested a more detailed description of the beneficiary's proposed duties; a description of the education and employment qualifications for the beneficiary's position in the U.S. entity; and a breakdown by percentage of time to be spent in each of the beneficiary's duties.

In response to the director's request, the petitioner provided the following description of the petitioner's proposed duties in the United States:

1. **Day-to-day operational management (30%).** Manage daily operations of the company including the planning and supervision of daily operations (order receipts, packaging, shipping, etc.); the planning and implementation of staffing, payroll; monitoring overall operational costs in coordination with company's accountant.
2. **Account management (20%).** Monitor account receivables and account payables. Liaise with customers with regard to their requirements and needs for products to ensure customer's high satisfaction. Analyze accounts' order history to develop marketing/sales strategies.
3. **Inventory and order management (5%).** Monitor inventory and incoming orders. Liaise and negotiate with suppliers for prices and terms.

4. **Product development (15%).** Research and develop new product concepts and trial products, and report them to management. Upon approval from management, plan and implement the new products to introduce to the market.
5. **Marketing and sales management (30%).** Identify markets and potential products. Based on continued research on customer preferences, market trends and new products, as well as competitors, develop and market potential new products, new marketing/sales strategies, and distribution channels.
6. **Decision-making functions.** The beneficiary will make decisions regarding purchasing items, and pay wages to employees in consultation with the company's accountant. The beneficiary will only consult President with regard to the company's major decisions.
7. **Budget management.** The beneficiary will be responsible for managing the budget of the company including forecasts, planning, and implementation. He will receive directions over the annual budget and annual business planning from President.
8. **Supervision.** The three employees (Office Manager, Procurement/Inventory Control Specialist, Procurement/Quality Control Specialist) under his supervision will consult the beneficiary on projects and assignments, and will report to the beneficiary the progress of these assignments. The beneficiary will monitor their performance, although he encourages team work approach among employees. The beneficiary will make inputs to President regarding hiring, firing, promotions and raises of these employees, which plays critical roles in President's personnel decisions.

In addition, the beneficiary will be responsible for the overall management of this new company as the second in command of the company next to President/CEO who will reside the United States on a part-time basis. Therefore the beneficiary will be responsible for: planning, directing and coordinating overall operations of the company; formulating and implementing operational policies and procedures; planning and implementing business strategies and procedures. The beneficiary will monitor the company's overall performance and regularly report it to President. As the highest ranking full-time employee of the company, the beneficiary will function in the managerial level of the company, and receive minimum directions from President.

The petitioner also submitted an organizational chart for the U.S. entity, which describes the duties of the employees under the beneficiary's supervision as follow:

Office Manager -- Maintain customer profiles; prepare invoices; monitor customer transaction details.

Procurement/Inventory Specialist -- Receive orders; prepare shipping; monitor and maintain [inventory].

Procurement/Quality Control Specialist -- Receive orders; prepare shipping; monitor and inspect product quality.

The petitioner also indicated the salary of each of the above employees, but expressly declined to set forth information regarding their education and immigration status "due to the privacy protection issues."

In denying the petition, the director concluded that the evidence failed to establish that the beneficiary is to be employed in the United States in a managerial or executive capacity as defined by the regulations. The director found that based on the description of the company and job duties, it is evident that the beneficiary will be engaged in all aspects of the operation, including day-to-day non-managerial duties. In addition, the director found that the evidence of record has not established the U.S. entity is more than the parent company's representative office in the United States, or that the function of the beneficiary is to be more than an import/export agent or trade representative.

On appeal, counsel for the petitioner asserts that the director erred in finding that the petitioner is an import/export agent or a trade representative not capable of supporting a managerial position, and that the petitioner is nothing more than a representative office of the foreign parent company. In support of these assertions, counsel submits voluminous new evidence for the purpose of demonstrating that the U.S. entity is an active business capable of supporting a full-time manager. The new evidence relating to the business of the petitioner includes: wire transfers from the parent company and bank statements of the petitioner; seller's license; corporate filings with the State of California; leases for warehouse and office space; phone bills; contracts with a temporary agency for the services of an accountant; and evidence of purchase of inventory and office computers and software. Counsel appears to raise no challenge to the director's findings regarding the scope and nature of the beneficiary's job duties.

Initially, the AAO notes that counsel has made no assertion on appeal that addresses the director's primary reason for denying the petition, namely that the petitioner has not established that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are *primarily* managerial or executive in nature. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The petitioner indicated that the beneficiary's job duties while employed by the U.S. entity would include such tasks as: monitoring account receivables and account payables, customer liaison, and analyzing accounts' order history to develop marketing/sales strategies (20%); monitoring inventory and incoming orders and liaising and negotiating with suppliers (5%); researching, developing and marketing new product (15%); and identifying and developing potential new products, new marketing/sales strategies, and distribution channels (30%). The petitioner grouped these tasks under categories such as "accounts management," "inventory and order management," and "marketing and sales management." However, based on the job descriptions provided by the petitioner, none of the employees under the beneficiary's supervision would be carrying out these tasks. Thus, rather than managing such functions, as the petitioner claimed, it would appear that 70% of the beneficiary's time would be spent directly performing these sales, marketing, customer service, contract negotiation, and inventory and account monitoring functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, as is the case here, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Though requested by the director, the petitioner did not provide any information relating to the education levels of the beneficiary's subordinates in the U.S. entity. Without such information, the AAO cannot determine whether these employees possess or require an advanced degree, such that they could be classified as professionals. Furthermore, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Based on the evidence, it also does not appear that any of the beneficiary's subordinate employees supervise other staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Based on the foregoing, the AAO agrees with the director's conclusion that the record does not demonstrate that the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

With respect to the evidence submitted by counsel on appeal, the regulation states that a petition "must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form." 8 C.F.R. § 103.2(b)(1). To the extent counsel endeavors to provide new evidence on appeal to demonstrate that the petitioner qualifies as "doing business" under the regulations, the AAO notes that the petitioner was put on notice, by way of the regulations and instructions on the petition, of required evidence and had a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents before the visa petition was adjudicated. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The appeal therefore will be adjudicated based on the record of proceeding before the director.

Based on the evidence that was before the director, the AAO agrees with the director's assessment that the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization "doing business" in the United States, or merely a representative office of the foreign entity in the United States. Under the regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(G)(2) and 214.2(l)(1)(ii)(H) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. The petitioner had included with the initial petition documentation pertaining to its purchase in December 2002 of the assets of an existing company engaged in the business of marketing and selling incense, fragrances and related products.¹ However, as the director had concluded based on the record before him, there was insufficient evidence to demonstrate that *at the time the petition was filed*, the petitioner was engaged in the business it had purchased, or was otherwise "engaged in the regular, systematic, and continuous provision of goods or

¹ The AAO notes that the petitioner expressly indicated in the Form I-129 that it is not seeking approval for the beneficiary to come to the United States to open a new office, and is instead seeking to employ the beneficiary for a three-year term. Thus, the regulations at 8 C.F.R. § 214.2(l)(3)(v), applicable to a "new office" petition, do not apply here.

services” rather than acting as the foreign entity’s representative office. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the U.S. and foreign entities are qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, *supra*; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). The petitioner indicated on the Form I-129 that the U.S. entity is a wholly-owned subsidiary of the foreign entity. However, the petitioner has not provided conclusive evidence of the foreign entity’s alleged ownership of interest in the petitioner. The petitioner submitted with the petition a notice to the Commissioner of Corporations of the State of California relating to an offering of common shares of the U.S. entity totaling \$4,500 in value, and the minutes of a meeting of the board of directors approving the sale of 1,500 shares, at \$3.00 per share, of the U.S. company to the foreign entity. However, the record lacks evidence that the foreign entity actually owns such shares in the U.S. entity, or that such shares constitute all of the issued and outstanding shares of the U.S. company.² Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control, and therefore cannot conclude that the petitioner has established that there is a qualifying relationship between the U.S. entity and the foreign entity. For this additional reason, the appeal must be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director’s decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.

² The AAO notes that the record does include a copy of share certificate number 1 of the U.S. entity. However, the certificate is blank and unexecuted, and no stock ledger or other record pertaining to the stock of the U.S. entity has been submitted.